defendant McGinley was restrained from enforcing it before it became effective and because this defendant's term of office would expire at the end of 1959.

On December 7, 1959, the District Court entered a final order denying a permanent injunction and dismissing plaintiff's complaint.

Treating this opinion on the merits, following trial and argument, as no more than a decision that its attack on the constitutionality of the statutes had been dismissed for want of a substantial federal question and arguing that the District Court, therefore, should have remanded the issue of discriminatory enforcement to a single judge, the plaintiff proceeded to appeal the discriminatory enforcement issue to the United States Court of Appeals for the Third Circuit. That Court held that no basis existed for splitting an appeal in such fashion and, on December 9, 1959, entered an order dismissing the appeal for want of jurisdiction. The present appeal, of course, raises all issues, including the issue of discriminatory enforcement, heard by the District Court. A petition for a writ of certiorari to the Court of Appeals to review its dismissal has likewise been filed at No. 700 October Term, 1959.

ARGUMENT

Plaintiff, a corporation engaged in a large-scale discount house business, here challenges the constitutionality of two sections of Pennsylvania's Penal Code, §699.4 and §699.10. In addition, it challenges the constitutionality of defendant McGinley's enforcement of §699.4 prior to his being restrained from so doing.

1. Insofar as the enforcement of §699.4 is concerned, the case is moot. Defendant McGinley was the elected District Attorney of Lehigh County, Pennsylvania, from January 2, 1956, to January 4, 1960. In the original complaint, filed on November 22, 1958, appellant sought only to restrain McGinley from threatening to arrest or from arresting appellant's employees for violation of §699.4. The amended complaint sought identical relief, adding §699.10 to its scope. No personal damages were sought from McGinley; he was sued solely in his capacity as District Attorney. McGinley's term of office having expired, no prospective relief can be granted appellant on the ground that McGinley enforced §699.4 discriminatorily.

Appellant's entire treatment of this problem is confined to one paragraph on page 5 of its jurisdictional statement, two paragraphs on pages 12-13 and one paragraph on pages 21-22. Only the last of these appears in the argument of appellant and contains nothing relating to possible mootness. Appellant's

only hint of a reason for pursuing this issue appears at the bottom of page 5 where it notes that "many prosecutions instituted by him [McGinley] still are pending". Appellee submits that such a casual reference to state criminal proceedings which are not before the Court for decision, which may involve a multitude of varying factual backgrounds and which have not been finally decided in the appropriate state courts hardly presents any reason for permitting a continuation of the discriminatory enforcement issue. The court below evidently thought this way, for it declined to determine the question.

Appellees' counsel, frankly, overlooked the nicety of appellant's motion of January 8, 1960, to the court below in which it moved to substitute appellee Joseph as "additional" defendant. This, of course, should not have been agreed to, but it cannot affect the mootness of appellant's case on this issue.

Quite apart from mootness, no valid proof of discriminatory enforcement was produced by appellant in the court below. The 1959 statute, §609.10, was never enforced by McGinley since he was restrained from doing so before it became effective. The 1939 statute was enforced by him when violations became a problem of law enforcement in Lehigh County. As a District Attorney in a small county, McGinley had only limited financial and personnel resources with which to enforce the law. Of necessity, he had to expend these resources in the way which most likely would protect the community and uphold the law. Both before and during his term of office, Sunday law violations resulting from the operation of industry or the conduct of recreational activities rarely

posed a sufficiently serious problem of law enforcement to require the neglect of more serious violations of law; hence, enforcement of the Sunday law in Lehigh County was for years admittedly lax but without discrimination.

When McGinley began to enforce §699.4, following a serious outbreak of commercial violations by appellant and other stores, his activities were not limited solely against appellant. The record proves this, and the court below confirms it (jurisdictional statement, appendix A, page 13a).

Appellant also sought to indict McGinley's enforcement by a far-fetched theory that he had been improperly induced to act by a competitor of appellant. This allegation appears in the jurisdictional statement on page 5 where appellant says that McGinley enforced the law "only" against appellant "for personal profit reasons". This invidious statement is simply untrue. The record refutes it; the court below did not even deem it worthy of mention. Appellant showed only that McGinley, in his private practice (permitted in Pennsylvania where no conflict with official duties arises), over several years' time had realized some small fees from a competitor of appellant and had engaged in a real estate transaction with this competitor. No relationship between these actions and McGinley's official conduct was shown by appellant; and, in fact, there was none.

Whatever "selectivity" of enforcement appears in the record is not the prohibited discrimination of *Yick Wo v. Hopkins*, 118 U. S. 356. It is simply the result of an exercise of reason by a public official

physically unable to achieve one hundred percent enforcement. This hardly justifies a conclusion that McGinley acted unconstitutionally.

Therefore, even assuming that this issue is not moot and that enforcement of the 1939 statute, §699.4, is before this Court, no basis exists for granting relief to appellant on this ground.

2. Despite appellant's repeated references in its jurisdictional statement to the Act of April 22, 1794, no such act is involved here. That act was expressly repealed by §1201 of the Penal Code of 1939, 18 Pa. Stat. Ann. §5201, *supra*; and the substance of its provisions was enacted as §699.4 of the Code. This latter section together with §699.10 of the Code, added in 1959, are the two statutory provisions attacked.

Attacks on Sunday laws and ordinances are far from new. What is relatively new is that the recent attacks have been made primarily, as this one is made, not by individuals who claim that they are prejudiced in the exercise of their religion, but by commercial enterprises seeking to remain open for business on Sunday.

Aside from any question of standing and assuming that the establishment of religion question is before the Court, no violation of the Constitution appears. Seven times in the past ten years this Court has dismissed for want of a substantial federal question direct appeals challenging the constitutionality of Sunday laws and ordinances on the same grounds as are raised here. *Friedman v. New York*, 341 U. S. 907; *State v. McGee*, 346 U. S. 802; *State v. Towery*, 347 U. S. 925; *Gundaker Central Motors v. Cassert*, 354

U. S. 933; *Grochowiak v. Pennsylvania*, 358 U. S. 47; *Kidd v. Ohio*, 358 U. S. 131 (1958); and *Ullner v. Ohio*, 358 U. S. 131 (1958). This Court has referred to such dismissals as dispositions on the merits. *Ohio ex rel. Eaton v. Price*, 360 U. S. 246.

Older decisions of this Court had upheld Sunday laws, characterizing them as civil regulations. *Soon Hing v. Crowley*, 113 U. S. 703; *Hennington v. Georgia*, 163 U. S. 299; *Petit v. Minnesota*, 177 U. S. 164. While these cases were decided prior to cases applying the religious protections of the First Amendment to the states under the Fourteenth Amendment, this fact cannot alter the nature of a Sunday law. If it was a civil regulation then, it is one today, not a religious law.

Confronted with this unbroken line of decisions, does the present case assert any new reason for not adhering to them? Appellant attempts to show that the Pennsylvania statute is unlike the various statutes attacked in the earlier cases, that it is a religious law and they were not. This not only offends common sense; it is inaccurate.

Most Sunday laws do, of course, find their origins in religious views. The Pennsylvania Act of 1794 was no exception. But to hold that §699.10 of the Penal Code, enacted in 1959 (or §699.4, enacted in 1939) is tainted because of a 1794 act would mean that a legislature is forever forbidden to act with respect to a particular subject because a prior legislature had done so in a way now thought invalid.

Secondly, antecedents of the New York statute in *Friedman v. New York*, supra, bore historical indicia

identical to antecedents of the Pennsylvania statute (and, incidentally, to the Massachusetts statute invalidated by Judge Magruder in *Crown Kosher Super Market of Mass., Inc. v. Gallagher*, 176 F. Supp. 466, now docketed on appeal at No. 532 October Term, 1959; appellees believe Judge Magruder simply erred in his treatment of the *Friedman* case). The court below in this case recognized this fact (jurisdictional statement, appendix A, pages 8a-10a).

Finally, no individual is prohibited by Pennsylvania's statute from doing anything his religion requires him to do or compelled to do anything his religion forbids him to do. The only compulsion is one placed upon all persons. Nor is any apparent tenet of one religion advanced by Sunday laws, Sunday closing and rest not appearing to be an article of Christian faith.[1]

3. Appellant's second objection to the Pennsylvania statute centers upon the classification contained therein. The 1959 Act (§699.10) purports to bar retail sales of specified commodities. The 1939 Act (§699.4) is general in scope but contains certain exceptions for acts of necessity and charity (and certain recreations).

Prior decisions of this Court have effectively answered appellant's contention. Discriminatory legislation is to be struck down only if the discrimination is "invidious", *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U. S. 483. The rules set forth in *Lind-*

[1] The "continental" Sunday is a well-known element of many contemporary societies in which Christianity is the majority religion.

sley v. Natural Carbonic Gas Co., 220 U. S. 61, 78-9, apply here; and appellant has not met the burden placed upon it by those rules. In fact, as the court below pointed out (jurisdictional statement, appendix A, pages 12a-13a) and found as a fact, the circumstances attending enactment of §699.10 in 1959 show a definite, rational basis for legislative action.

What appellant seeks is for the Court to substitute its view of the wisdom of this legislation for that of the legislature. Here, the legislature may have determined that the abuses sought to be corrected by §699.10 were greater at the retail level than at the wholesale one; it may have concluded that certain exceptions (e.g. foods and drugs) were necessary to preserve the health of the citizenry. The Courts should not revaluate these decisions unless the distinctions are "invidious". That they are not is clear.

4. The court below did not pass upon §699.4 (the 1939 Act) because it felt that §699.10 (the 1959 Act) superseded the former insofar as appellant's activities are concerned. It further concluded that resolution of this problem of statutory construction, when made by the state courts, might well prevent any application of the provision to appellant. Even if the statute clearly were applicable to appellant, however, the court below found that appellant was in no jeopardy from its enforcement.

Should the court below have passed upon the 1939 Act? Appellant says that the state court "less than a year before" (jurisdictional statement, page 22) had held this act to be applicable to appellant's employees. What appellant does not state is that this

application occurred *before* passage of the 1959 Act and concerned violations occurring prior to such passage. No error can be shown on this ground.

Section 66 of the Pennsylvania Statutory Construction Act of May 28, 1937, Pamphlet Laws 1019, 46 Pa. Stat. Ann. §566, states that when two laws, passed at different legislative sessions, are irreconcilable, the later shall prevail. The Supreme Court of Pennsylvania has held that a specific penal provision will apply to an act in lieu of a general one otherwise applicable. *Commonwealth v. Brown*, 346 Pa. 192. Under these circumstances, the lower court wisely did not conjecture that both laws could be applied to appellant's employees, particularly since it found that appellant was in no danger under the 1939 Act.

CONCLUSION

Even in an area of law so charged with emotion (and economics), the light of reason occasionally intrudes. In the February, 1960, issue of the Harvard Law Review, 73 Harv. L. Rev. 729, appears a Note, "State Sunday Laws and the Religious Guarantees of the Federal Constitution", dispassionately analyzing the present problem. Its conclusion, fairly stated, appellees submit, is that Sunday laws do not violate the federal constitution,[2] that such laws serve a legitimate social purpose in contemporary society and that they stem from a reasonable exercise of legislative power.

[2] Except possibly in one instance, not involved here, concerning recreational prohibitions.

Throughout their long history, Sunday laws have hardly reflected either a unanimous public sentiment or an approach perfect in its symmetry. But lack of these features does not render them unconstitutional. Nothing, moreover, in the present attack, justifies a departure from the prior decisions of this Court for nothing has occurred to give merit to this appeal or lend substantiality to the questions raised.

For the foregoing reasons, appellees move that the order of the court below be affirmed.

Respectfully submitted,

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959.

No. ~~609~~. 36

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,

Appellant,

v.

PAUL A. McGINLEY, District Attorney, County of Lehigh, Pennsylvania, and GEORGE J. JOSEPH, District Attorney, County of Lehigh, Pennsylvania,

Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1959.

No. 699.

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Appellant,

v.

PAUL A. McGINLEY, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA, AND GEORGE J. JOSEPH, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM.

1. Appellees open their Motion with an argument as to mootness, which on hasty reading might seem to be intended to apply to all the issues here, although actually, despite its prominent position in the Motion, it is limited to "the [discriminatory] *enforcement* of § 699.4."

This case is not moot, in any respect.

(a) The Act of 1959, referred to by appellees as Section 699.10 of the Pennsylvania Penal Code, appellees themselves admit, will be enforced by the present District Attorney if he is not enjoined. See Motion and Order, dated January 8, 1960, adding Joseph as an additional substituted defendant.

(b) The Act of 1794, re-enacted *ipsissimis verbis* when the Pennsylvania Criminal Laws were codified in 1939, as Section 699.4 of the Penal Code, will likewise be enforced by the present District Attorney if he is not enjoined. Even if appellees are correct in their present assertion (which is contrary to the position taken by

them at the trial), that the Act of 1794 cannot be applied to the sale of an item also covered by the Act of 1959, that does not dispose of the matter. As the record shows, appellant sells many items covered only by the Act of 1794 and not by the Act of 1959.

(c) The issue of discriminatory enforcement, as distinguished from the constitutional infirmity of the statutes themselves, likewise is not moot, even though the discriminating District Attorney has now left office. The decision of a great number of criminal proceedings instituted by him during the period December 2, 1957 to November 22, 1958 and from December 7, 1959 to January 4, 1960 has been deferred by the local courts pending the final decision in this case. If the decision is favorable to appellant on the issue either of discriminatory enforcement or of the constitutionality of the statute, those prosecutions will be dismissed. Otherwise, they will be proceeded with, to the substantial injury of the appellant. Cf. *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, 453 (1911).

2. The record does show a shocking case of discriminatory enforcement, pursuant to a conspiracy with appellant's principal competitor, with the District Attorney receiving very substantial sums of money from the competitor. The three-judge court avoided a definitive decision on this issue on the ground that the District Attorney would go out of office shortly anyway, so that this issue would become moot. For the reason just stated, this was an erroneous view.

In the event that certiorari were denied in the companion case, October Term, 1959, No. 700, because of the recent decision in *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, October Term, 1959, No. 49, March 7, 1960, it would appear appropriate to hear argument on the issue of discriminatory enforcement in this direct appeal.

3. The court below found as facts that the laws in question here are religious in purpose, application and effect. It appears from their opinion and the opinion filed in

the companion case of *Bargaintown, U. S. A. v. Whitman*, Civil Action No. 6760 (U. S. D. C. for M. D. of Pa.) that if it had not been for the one-line order of the Supreme Court in *Friedman v. New York*, 341 U. S. 907 (1951), the court below might very well have reached the same conclusion as the three-judge court for the District of Massachusetts in *Crown Kosher Super Market of Massachusetts, Inc. v. Gallagher*, 176 F. Supp. 466, now on appeal at No. 532, October Term, 1959. It is respectfully suggested that it would be appropriate to accord plenary consideration to these fundamental constitutional issues, now that two judges of the Courts of Appeals (Judges Magruder and Woodbury) and one District Court Judge (Judge Welsh) have found that such legislation is unconstitutional, and one Court of Appeals Judge (Judge Hastie) and two District Judges (Lord and McCarthy) have found that it is constitutional.*

If the *Crown Kosher* case is affirmed, it would be inconsistent not to reverse here, particularly without oral argument. If oral argument is granted in *Crown Kosher*, it would appear appropriate to hear this appeal at the same time.

4. The distinctions made by the Pennsylvania Sunday legislation are "invidious", to borrow a word from appellees. The 1959 law, if it is not really a religious law, as found as a fact by the Court below, is a cynical effort in the name of religion to destroy the discount stores which cater to Sunday family shopping groups, who cannot visit conveniently the large center-city department stores during the week, and who prefer economy to expensive "services". Such discount stores, moreover, have been the vehicle by which the small merchants who have been driven out of business by the large downtown department stores have been able to reenter business. They constitute the independent concessionaires in the discount stores who, by join-

* The emphasis in the Conclusion of the Motion to affirm of a student Law Review note adds little weight to the Motion. E.g., 5 Villanova L. Rev. 308 (1960) is contra.

ing together, have been able to buy in large quantities and also have the advantage of a lower rent per square foot.

5. This plaintiff, having been found by the court below to be suffering actual damage by enforcement of the legislation claimed to be unconstitutional, has standing to maintain this litigation. *Pierce v. Society of the Sisters of the Holy Names*, 268 U. S. 510 (1925) (particularly with respect to the holding dealing with the military academy which had no religious connection whatsoever); see also, *Barrows v. Jackson*, 346 U. S. 249 (1953); *Bartels v. Iowa*, 262 U. S. 404, 410-411 (1923); *Buchanan v. Warley*, 245 U. S. 60 (1917); *Truax v. Raich*, 239 U. S. 33 (1915); *Helvering v. Gerhardt*, 304 U. S. 405 (1938); *Metcalf v. Mitchell*, 269 U. S. 514 (1926).

Appellant, therefore, respectfully moves that the Motion to Affirm be denied, and that probable jurisdiction be noted and oral argument be granted in this case, so that the vital constitutional issues raised by this record may receive the plenary consideration not yet accorded them in this century.

Respectfully submitted,

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March 28, 1960